



(4310-6W-P)

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 30

Notice of Intent to Establish an Adequate Yearly Progress Negotiated Rulemaking Committee

AGENCY: Bureau of Indian Education, Interior.

ACTION: Notice of intent; request for comments or nominations.

SUMMARY: The Bureau of Indian Education (BIE) is announcing its intent to establish an Adequate Yearly Progress Negotiated Rulemaking Committee (Committee). The Committee will recommend revisions to the existing regulations for Adequate Yearly Progress (AYP). As required by the No Child Left Behind Act of 2001, the Secretary will select representatives of Indian tribes for the Committee from among individuals nominated by tribes whose students attend BIE-funded schools operated by either the Bureau or by the tribe through a contract or grant and who would be affected by a final rule. The BIE solicits comments on this proposal to establish the Committee, including comments on additional interests not identified in this notice of intent, and invites tribes to nominate representatives for membership on the Committee.

DATES: Submit nominations for Committee members or written comments on this notice of intent on or before **(INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*).**

ADDRESSES: You may submit nominations for Committee members or written comments on

this notice of intent by any of the following methods:

- Send comments or nominations to Ms. Sue Bement, Designated Federal Officer, Bureau of Indian Education, 1011 Indian School Road, NW, Suite 332, Albuquerque, New Mexico, 87104; e-mail: AYPcomments@bia.gov; Telephone: (505) 563-5274; Fax: (505) 563-5274; or
- Hand-carry comments or use an overnight courier service. Our courier address is Manuel Lujan Jr. Building, Building II, Suite 332, 1011 Indian School Road NW, Albuquerque, New Mexico, 87104.

FOR FURTHER INFORMATION CONTACT: Ms. Sue Bement, Designated Federal Officer; Telephone: (505) 563-5274; Fax: (505) 563-5281.

SUPPLEMENTARY INFORMATION:

I. Background

The No Child Left Behind Act of 2001 (Act) required States to use certain academic content standards, assessments, and a specific methodology for calculating the AYP of students (together, referred to as an “accountability system”) to measure academic achievement. *See* 20 U.S.C. 6311. The Act’s amendments to the Elementary and Secondary Education Act (ESEA) required the Bureau of Indian Affairs (BIA) to promulgate regulations through negotiated rulemaking for the accountability system to be used in Bureau-funded schools. *See* 20 U.S.C. 6316(g)(1)(A)(i); 25 U.S.C. 2017-2018.

In 2005, the BIA promulgated such regulations. *See* 70 FR 22178 (April 28, 2005). These regulations, codified at 25 CFR 30.104, require BIE to use the accountability system of the State in which a BIE-funded school is located to calculate AYP.

BIE-funded schools are located in 23 different States; and each State has its own accountability system. As a result, each State system produces student achievement data that cannot be directly compared with data from other States. For BIE, comparison is necessary to identify under-performing schools and direct resources effectively.

BIE had previously developed a method for comparing academic achievement across States despite the variances in academic standards. But now that some States have received flexibility waivers from the Department of the Education, BIE will no longer be able to use this method to effectively compare achievement. It is necessary, therefore, to revise 25 CFR Part 30.

BIE has already conducted several regional meetings on the topic of accountability in BIE-funded schools. Meetings were held in Oklahoma City, OK, on July 17, 2012; Flagstaff, AZ, on July 20, 2012; Seattle, WA, on July 24, 2012; and Bismarck, ND, on July 27, 2012.

II. Statutory Provisions

The Negotiated Rulemaking Act of 1996 (NRA) (5 U.S.C. 561 *et seq.*); the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix 2); the No Child Left Behind Act (20 U.S.C. 2000 *et seq.*).

III. The Committee and Its Process

In a negotiated rulemaking, the provisions of a proposed rule are developed by a committee composed of at least one representative of the government and representatives of the interests that will be significantly affected by the rule. Decisions are made by consensus, which means unanimous concurrence among the interests represented on the Committee, unless the Committee (1) agrees to define “consensus” to mean a general but not unanimous concurrence, or (2) agrees upon another specified definition. 5 U.S.C. 562(2)(A) and (B).

As part of the negotiated rulemaking process, the agency has identified interests potentially affected by the rulemaking under consideration, including students enrolled at 174 BIE-funded schools, parents of such students, school administrators, tribes, and the Indian communities served by these schools. By this notice of intent, BIE is soliciting (1) comments on its proposal to form a negotiated rulemaking committee and (2) nominations for Committee members who will adequately represent the interests which are likely to be significantly affected by the proposed rule.

Following the receipt of nominations and comments, the BIE will publish in the Federal Register a list of persons to represent the interests which are likely to be significantly affected by the rule, and the person or persons proposed to represent the agency. Persons who will be significantly affected by the proposed rule and who believe that their interests will not be adequately represented by any person specified in the abovementioned Federal Register notice will be given an opportunity to apply for, or nominate another person for, membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule.

Following the second Federal Register notice and responses to it, the BIE expects to establish the Committee. After the Committee reaches consensus on the provisions of the proposed rule, as discussed in more detail below, the BIE will publish a proposed rule in the Federal Register.

Under 5 U.S.C. 563, the head of the agency is required to determine that the use of the negotiated rulemaking procedure is in the public interest.

In making such a determination, the agency head must consider certain factors. Taking these factors into account, the Secretary, through the authority delegated to the Assistant Secretary — Indian Affairs, has determined that a negotiated rulemaking is in the public interest because:

1. A rule is needed. The No Child Left Behind Act, 20 U.S.C. 2000 *et seq.*, directs the Secretary to conduct a negotiated rulemaking pursuant to the NRA. The current definition of AYP creates a fragmented accountability system that prevents the BIE from developing and implementing comprehensive school reform initiatives in the 174 BIE-funded schools in 23 States.
2. A limited number of identifiable interests will be significantly affected by the rule. 174 BIE-funded schools, the students enrolled at these schools, school administrators, tribes, and Indian communities served by these schools will be significantly affected by this review and the recommendations made by this Committee.
3. There is a reasonable likelihood that the Committee can be convened with a balanced representation of persons who can adequately represent the interests discussed in item 2, above and who are willing to negotiate in good faith to attempt to reach a consensus on provisions of a proposed rule.

4. There is a reasonable likelihood that the Committee will reach consensus on a proposed rule within a fixed period of time.
5. The use of negotiated rulemaking will not unreasonably delay the development of a proposed rule because time limits will be placed on the negotiation. We anticipate that negotiation will expedite a proposed rule and ultimately the acceptance of a final rule.
6. The BIE is making a commitment to ensure that the Committee has sufficient resources to complete its work in a timely fashion.
7. The BIE, to the maximum extent possible and consistent with the legal obligations of the agency, will use the consensus report of the Committee as the basis for a proposed rule for public notice and comment.

IV. Negotiated Rulemaking Procedures

In compliance with FACA and NRA, the BIE will use the following procedures and guidelines for this negotiated rulemaking. The BIE may modify them in response to comments received on this notice of intent or during the negotiation process.

A. Committee Formation

The Committee will be formed and operated in full compliance with the requirements of FACA and NRA, and specifically under the guidelines of its charter.

B. Member Responsibilities

The Committee is expected to meet approximately three to five times. The meetings will be held at various locations across Indian country, and will last two to three days each.

The initial meeting will be in person; some later meetings may be held by teleconference and/or web-conference. The Committee's work is expected to occur over the course of 6-12 months.

Because of the scope and complexity of the tasks at hand, committee members must be able to invest considerable time and effort in the negotiated rulemaking process.

Committee members must be able to attend all committee meetings, work on committee work groups, consult with their constituencies between committee meetings, and negotiate in good faith toward a consensus on issues before the committee. Because of the complexity of the issues under consideration, as well as the need for continuity, the Secretary reserves the right to replace any member who is unable to participate in the Committee's meetings.

Responsibility for expenses is stated under 5 U.S.C. 568(c) as follows: Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation in such committee, except that an agency may, in accordance with section 7(d) of the Federal Advisory Committee Act, pay for a member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if—

- (1) such member certifies a lack of adequate financial resources to participate in the Committee; and

- (2) the agency determines that such member's participation in the

Committee is necessary to assure an adequate representation of the member's interest.

The BIE commits to pay the reasonable travel and per diem expenses of Committee members, if appropriate under the NRA and Federal travel regulations.

C. Composition of Committee.

The Secretary is seeking nominations for tribal representatives, consistent with the provisions of 25 U.S.C. 2018, to serve on the Committee, who have a demonstrated ability to communicate well with groups about the interests they will represent. The Committee cannot exceed 25 members, and the BIE prefers 15.

Tribal Committee membership must:

- Meet the Act's requirements for proportionate representation of tribes served by BIE-funded schools;
- Be selected from among individuals nominated by tribes that have students attending BIE-funded schools either operated by the Bureau or by the tribe through a contract or grant; and
- Mirror the proportionate share of students from the tribes served by the BIE-funded school system.

The Act requires the Secretary to ensure that the various interests affected by the proposed report(s) or rules be represented on the Committee. In making membership decisions, the Secretary shall consider whether the interest represented by a nominee will be affected significantly by the final products of the Committee, which may include report(s) and/or proposed regulations; whether that interest is already adequately

represented by tribal nominees; and whether the potential addition would adequately represent that interest.

D. Administrative and Technical Support.

The BIE will provide sufficient administrative and technical resources for the Committee to complete its work in a timely fashion. BIE, with the help of the facilitator, will prepare all agendas, provide meeting notes, and provide a final report of any issues on which the Committee reaches consensus.

E. Training and Organization.

At the first meeting of the Committee, a neutral facilitator will provide training on negotiated rulemaking, interest-based negotiations, consensus-building, and team-building. In addition, at the first meeting, Committee members will make organizational decisions concerning protocols, scheduling, and facilitation of the Committee.

F. Interests Identified Through Consultation.

Under Section 562 of the NRA, “‘interest’ means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner.” We have consulted with BIE personnel, educators at BIE-schools, tribal officials, parents, teachers, administrators, and school board members of tribes served by BIE-funded schools. The BIE has determined that the interests likely to be significantly affected by this new rule include the 174 BIE-funded schools, the students enrolled at these schools, school administrators, tribes, and the Indian communities served by these

schools. BIE is accepting comments identifying other interests that may be significantly affected by the final products of the Committee, which may include report(s) and/or proposed regulations, until the date listed in the DATES section of this notice of intent.

V. Request for Nominations and Comments

The BIE solicits nominations from tribes whose students attend BIE-funded schools operated either by the BIE or by the tribe through a contract or grant, to nominate tribal representatives to serve on the Committee and tribal alternates to serve when the representative is unavailable.

Based upon the proportionate share of students, some tribes similar in affiliation or geography are grouped together for one seat. It will be necessary for such nominating tribes either to co-nominate a single tribal representative to represent the multi-tribal jurisdiction or for each tribe in the multi-tribal jurisdiction to nominate a representative with the knowledge that BIE will only be able to appoint one of the nominees who will then be responsible for representing the entire multi-tribal jurisdiction on the Committee. Each nomination is expected to include a nomination for a representative and an alternate who can fulfill the obligations of membership should the representative be unable to attend. The Committee membership should reflect the diversity of tribal interests, and tribes should nominate representatives and alternates who will:

- Have knowledge of school assessments and accountability systems;
- Have relevant experience as past or present superintendents, principals, facility managers, teachers, or school board members, or possess direct experience with adequate yearly progress;
- Be able to coordinate, to the extent possible, with other tribes and schools who may not be represented on the Committee;

- Be able to represent the tribe(s) with the authority to embody tribal views, communicate with tribal constituents, and have a clear means to reach agreement on behalf of the tribe(s);
- Be able to negotiate effectively on behalf of the tribe(s) represented;
- Be able to commit the time and effort required to attend and prepare for meetings; and
- Be able to collaborate among diverse parties in a consensus-seeking process.

VI. Submitting Nominations.

The Secretary will only consider nominees nominated through the process identified in this Federal Register notice. Nominations received in any other manner will not be considered.

Nominations must include the following information about each nominee:

- (1) The nominee's name, tribal affiliation, job title, major job duties, employer, business address, business telephone and fax numbers (and business e-mail address, if applicable);
- (2) The tribal interest(s) to be represented by the nominee (see section V of this notice of intent) and whether the nominee will represent other interest(s) related to this rulemaking, as the tribe may designate;
- (3) A resume reflecting the nominee's qualifications and experience in Indian education (which may include being a parent of a student attending a BIE-funded school); and

(4) A brief description of how they will represent tribal views, communicate with tribal constituents, and have a clear means to reach agreement on behalf of the tribe(s) they are representing.

Additionally, a statement whether the nominee is only representing one tribe's views or whether the expectation is that the nominee represents a specific group of tribes.

To be considered, nominations must be received by the close of business on the date listed in the **DATES** section, at the location indicated in the **ADDRESSES** section.

Certification

For the above reasons, I hereby certify that the Adequate Yearly Progress Negotiated Rulemaking Committee is in the public interest.

January 22, 2013

Dated:

Kevin K. Washburn
Assistant Secretary – Indian Affairs

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